IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. OP 13-0789

MEA-MFT, the Montana State AFL-CIO, the Montana Public Employees Association, the Montana Human Rights Network, and the American Federation of State, County and Municipal Employees,

Petitioners,

v.

THE STATE OF MONTANA HONORABLE TIM FOX,
In his capacity as Attorney General,

Respondent.

PETITIONERS' OPENING BRIEF

APPEARANCES:

JOHN M. MORRISON
FREDERICK F. SHERWOOD
ROBERT FARRIS-OLSEN
MORRISON, SHERWOOD, WILSON
& DEOLA PLLP
401 North Last Chance Gulch
P.O. Box 557
Helena, Montana 59624-0557
(406) 442-3261 · (406) 443-7294 fax
john@mmslawgroup.com
rick@mmslawgroup.com
rfolsen@mmslagroup.com
Attorneys for Petitioners

TIMOTHY C. FOX
MONTANA ATTORNEY GENERAL
JON BENNION
DEPUTY ATTORNEY GENERAL
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026 · (406) 444-3549 fax
jonbennion@mt.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

I. STATEMENT OF THE ISSUES

1. Whether the Attorney General's legal sufficiency determination is incorrect because the Ballot Title does not comply with § 5-4-102, MCA.

2. Whether the Attorney General's legal sufficiency determination is incorrect because LR-127 encompasses more than one subject in violation of Article V, § 11(3), of the Montana Constitution.

3. Whether the Attorney General's ballot statement of purpose and implication complies with § 13-27-312, MCA, even though the statement is untruthful, misleading and contradictory.

II. STATEMENT OF THE CASE

This case is submitted pursuant to § 13-27-316, MCA, and Petitioners respectfully request this Court to find that Attorney General's legal sufficiency determination regarding Legislative Referendum 127 (hereinafter "LR-127") was incorrect and that the proposed referendum does not comply with statutory and constitutional requirements governing submission of the issue to the electors, that the issue is void and that LR-127 may not appear on the ballot.

III. STATEMENT OF THE FACTS

In the 2013 legislative session, the Montana Legislature considered SB-408. (A copy of SB-408 is attached hereto as Exhibit 1.) SB-408 was not passed into law through submission to the Governor, but instead was passed by the Legislature as a referendum. SB-408 is currently designated as LR-127, which is scheduled to

appear on the ballot in the November election of 2014. (LR-127 ballot language is attached hereto as Exhibit 2.)

The title of SB-408/LR-127 is:

AN ACT GENERALLY REVISING ELECTION LAWS; PROVIDING THAT THE TWO CANDIDATES WHO RECEIVE THE MOST VOTES IN CERTAIN PRIMARY ELECTIONS FOR PARTISAN OFFICES ADVANCE TO THE GENERAL ELECTION IRRESPECTIVE OF PARTY AFFILIATION; ELIMINATING SEPARATE PARTY BALLOTS AND PROVIDING FOR ONE PRIMARY BALLOT CONTAINING ALL PRIMARY RACES; PROVIDING THAT THE PROPOSED ACT BE SUBMITTED TO THE QUALIFIED ELECTORS OF MONTANA; AMENDING SECTIONS 2-16-615, 5-2-402, 5-2-403, 5-2-404, 5-2-406, 7-2-2219, 7-3-176, 7-3-218, 7-3-313, 7-3-412, 7-3-512, 7-3-704, 7-3-1256, 7-4-2106, 7-4-2206, 7-4-2302, 7-4-2310, 7-4-4112, 13-1-101, 13-1-103, 13-4-102, 13-10-201, 13-10-203, 13-10-204, 13-10-209, 13-10-211, 13-10-301, 13-10-325, 13-10-326, 13-10-327, 13-10-402, 13-10-403, 13-10-404, 13-10-405, 13-10-501, 13-10-504, 13-10-505, 13-12-201, 13-12-202, 13-12-203, 13-12-205, 13-12-207, 13-13-214, 13-13-225, 13-13-241, 13-14-111, 13-14-112, 13-14-113, 13-14-114, 13-14-115, 13-14-117, 13-14-118, 13-15-201, 13-15-205, 13-15-206, 13-15-208, 13-15-405, 13-15-406, 13-15-507, 13-16-101, 13-16-201, 13-16-211, 13-16-412, 13-16-418, 13-16-419, 13-16-501, 13-17-103, 13-19-205, 13-21-205, 13-25-101, 13-25-201, 13-25-205, 13-25-303, 13-35-106, 13-35-205, 13-35-206, 13-35-207, 13-35-214, 13-35-218, 13-35-221, 13-35-225, 13-35-226, 13-36-101, 13-36-102, 13-36-103, 13-36-104, 13-36-201, 13-36-202, 13-36-203, 13-36-206, 13-36-207, 13-36-209, 13-36-210, 13-36-211, 13-36-212, 13-37-127, 13-37-216, 13-37-218, 13-38-101, AND 13-38-201, MCA; REPEALING SECTIONS 13-10-302, 13-10-303, 13-10-305, 13-10-311, 13-10-502, 13-10-503, 13-10-507, 13-10-601, 13-10-602, 13-10-604, AND 13-38-204, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE.

LR-127's title, as formatted herein, is 187 words, but no matter how it is formatted, the title far exceeds 100 words. This number was calculated using Microsoft Word's word count system, as required by this Court.

Following the passage of SB-408, the Attorney General conducted a legal sufficiency review under § 13-27-312, MCA. As part of his review, the Attorney General drafted a statement of purpose and implication, received input from interested parties, and amended the statement. The amended, and final statement of purpose and implication is:

> The 2013 Legislature submitted this proposal for a vote. LR-127 generally amends election laws to provide that the two candidates who receive the most votes in certain primary elections for partisan offices will advance to the general election irrespective of political party affiliation. Candidates may state a political party preference that will appear on the ballot. LR-127 does not amend the primary process for party precinct elections or presidential primary elections. LR-127 amends primary election balloting by requiring all races to appear on the same ballot. LR-127 also generally amends certain related procedures regarding vacancies, write-in candidates, withdrawal of candidates, recall petitions, election judges, filing deadlines, certification of votes, ballot form and uniformity requirements, recounts, electioneering, election challenges, and contribution limitations.

Thereafter, the Attorney General informed the Secretary of State that LR-127 did not conflict with another ballot issue, was legally sufficient, and forwarded the final statement of purpose and implication to the Secretary of State. It is from these actions that Petitioners have brought the present action.

IV. STANDARD OF REVIEW

Mixed questions of law and fact are presented to this Court when the historical facts of a case are admitted or established, the applicable law is undisputed, and the issue is whether the facts satisfy the statutory standard. The issues in this case present mixed questions of law and fact. This Court reviews mixed questions of law and fact *de novo*. *Stop Over Spending Montana v. State*, 2006 MT 178, ¶ 10, 333 Mont. 42, 139 P.3d 788.

The constitutionality of a statute is a question of law, for which the Court's review is plenary. *City of Billings v. Albert*, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828.

The statements prepared by the Attorney General are before the Court, and there is no dispute regarding which statutes apply. The question at bar is therefore a mixed question of law and fact, which this Court reviews *de novo*. *Stop Over Spending Montana,* ¶ 10. The Court reviews the Attorney General's ballot statements solely for compliance with § 13-27-312, MCA. *Citizens Right to Recall v. State*, 2006 MT 192, ¶ 13, 333 Mont. 153, 142 P.3d 764.

V. SUMMARY OF ARGUMENT

LR-127 should not be placed on the ballot because its title is more than 100 words in violation of § 5-4-102, MCA, because it contains more than one subject in contravention of Article V, § 11(3) of the Montana Constitution, and because the

statement of purpose and implication provided by the Attorney General's office is untruthful and misleading in violation of § 13-27-312(4), MCA.

The Attorney General's legal sufficiency review was incorrect because LR-127's bill title is more than 100 words. LR-127's title far exceeds 100 words because it includes a substantial list of Montana Code section numbers, which this Court must count as words. The common and ordinary definition of "word" includes counting numbers as words, a conclusion this Court agreed with in *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 86-88, 195 P. 841, 848 (1921), *overruled on other grounds*, *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975), and a conclusion with which Legislative Services Division agrees. Election officials and courts around the country agree that counting numbers as words is the correct method for determining the total word count in direct legislation. Because numbers are words, LR-127 at nearly 200 words, is not in substantial compliance with § 5-4-102, MCA, and LR-127 may not be placed on the ballot.

Pursuant to Article V, § 11(3) of the Montana Constitution, a legislative referendum may only contain a single subject, unless it is a general revision of the law. The general revision exception to the single-subject rule only applies in those cases where the purpose of the legislation is to manifestly harmonize and revise generally existing statutes in order to render them consistent with each other and to eliminate conflicts existing between separate acts. LR-127 does more than

harmonize existing statutes; its purpose is to manifestly change the election laws in at least two separate and substantial ways: 1) to provide for an open primary election system, and 2) to provide that the top two vote winners—and no other candidates—advance to the general election regardless of party affiliation. Additionally, LR-127 essentially eliminates the right of third parties to appear on the general election ballot, while weakening all political parties by allowing only a "party preference" on the ballot. By placing these subjects on the ballot under the guise of a single subject, voters will be forced to vote for or against multiple independent propositions that they may not have voted for singly. These subjects, moreover, are independent of each other because each subject could be adopted without the others. In light of the fact that LR-127 contains multiple subjects, the Attorney General's legal sufficiency review is incorrect and LR-127 may not be placed on the ballot.

LR-127 is further flawed because the Attorney General's statement of purpose and implication is misleading and untruthful. His statement is untruthful because it tells voters that the primary process for party precinct and presidential primary elections will not change even as the measure does change the primary process for those elections. The ballot statement, in relation the primary process for party precinct and presidential elections, also contains contradictory and misleading information. Further, the statement is misleading because it omits

certain – important – changes to the law and only provides that certain other subjects will be "generally amend[ed]." In light of these facts, if LR-127 is placed on the ballot, voters will not be able to make an intelligent and informed decision. For this reason, as well, this honorable Court should not permit LR-127 to be placed on the ballot.

VI. ARGUMENT

A. SB-408/LR-127's bill title contains more than 100 words in violation of § 5-4-102, MCA, rendering the Attorney General's legal sufficiency review incorrect.

Section 5-4-102, MCA, states: "**Limitation on the title of referred legislation.** All bills referred by the legislature to a vote of the people shall have a title of no more than 100 words." The statute is mandatory and requires that any *bill* referred *by the Legislature* must have a title of 100 words or less. *Sawyer Stores v. Mitchell*, 103 Mont. 148, 175, 162 P.2d 342, 355 (1936) (emphasis added).[1] This provision is "simple, understandable, and a compliance therewith involves little if any difficulty." *Sawyer Stores*, 103 Mont. at 175, 162 P.2d at 355. LR-127's title violates this statute because it contains more than 100 words. LR-127 is therefore legally insufficient, and Petitioners respectfully request this honorable Court to order that LR-127 may not appear on the ballot.

[1] Though *Sawyer Stores* refers to § 103, R.C.M. (1935), that section is similar to § 5-4-102, MCA. Both sections require that the title of a referendum may not exceed 100. *See Sawyer Stores*, 103 Mont. at 154-55, 162 P.2d at 346.

1. Because section numbers constitute words, SB-408/LR-127's bill title violates § 5-4-102, MCA, and should not be allowed on the ballot.

Section numbers are words for the purposes of § 5-4-102, MCA. In interpreting a statute, this Court looks first to the plain meaning of the words it contains. *State v. Cooksey*, 2012 MT 226, ¶ 68, 366 Mont. 346, 286 P.3d 1174 (citations omitted). Where the language is clear and unambiguous, the statute speaks for itself and this Court will not resort to other means of interpretation. *Cooksey*, ¶ 68. In this regard, words used by the Legislature must be given their usual and ordinary meaning. *Cooksey*, ¶ 68; *see also, Rocky Mt. Bank v. Stuart*, 280 Mont. 74, 80, 928 P.2d 243, 246-47 (1996); *see also, City of Missoula v. Cox*, 2008 MT 364, ¶ 9, 346 Mont. 422, 196 P.3d 452; § 1-2-106, MCA.

The usual and ordinary meaning of "word" includes any character or set of characters separated by whitespace, which includes numbers. This definition of word is widely supported. The American Heritage Dictionary defines "word" as "a sound or combination of sounds, or its representation in writing or printing, that symbolizes and communicates a meaning." *See* Word, American Heritage Dictionary Online, http://www.ahdictionary.com/word/search.html?q=Word submit.x=46&submit.y=13 (last accessed Jan. 4, 2014). Similarly, Merriam-Webster defines "word" as "a written or printed character or combination of characters representing a spoken word." *See* Word, Merriam-Webster,

http://www.merriam-webster.com/dictionary/word (last accessed Jan. 4, 2014). *See also* Word Count, Wikipedia, http://en.wikipedia.org/wiki/Word_Count (last accessed Jan. 4, 2014) ("The consensus is to accept the text segmentation rules generally found in most word processing software ...."). Under these definitions a printed section number constitutes a word because it is a series of characters, or a representation of a combination of sounds, in writing that communicates a meaning.

This interpretation was adopted in *State ex rel. Bonner v. Dixon*, 59 Mont. at 86-88, 195 P. at 848, wherein the petitioners challenged a ballot initiative that was passed at a general election, because its title contained more than ten words. The title, "Providing for $5,000,000 Bonds for Buildings at State Educational Institutions," was either ten or twelve words depending on whether "$5,000,000" (five million dollars) was one or three words. In rejecting the petitioner's challenge, the court held (1) that "$5,000,000," constituted at least one word, and (2) that, even if it constituted three words, the title would be allowed because 12 words was close enough to 10 that the title would still "substantially" comply with the statutory requirement. *Bonner*, 59 Mont. at 87-88, 195 P. at 848. In keeping with *Bonner*, Petitioners respectfully submit that this Court should find that each of the statutory numbers appearing in the title of SB-408 constitutes at least one word.

However, unlike *Bonner*, the ballot title in this case is not in substantial compliance with the statutory requirements. In *Bonner*, the title was potentially two words too long. *Bonner*, 59 Mont. at 87-88, 195 P. at 848. The *Bonner* Court would not invalidate that ballot initiative, after passage, where "there has been a substantial compliance with statutory requirements." *Id.* In contrast, the present bill title, at nearly 200 words, is almost twice as long as that permitted in § 5-4-102, MCA, and therefore not in substantial compliance with the statute. This Court in *Bonner* even intimated that a title of approximately 200 words would not have been in substantial compliance with a 100-word limitation. *Bonner*, 59 Mont. at 85-86, 195 P. at 847-48. Similarly, LR-127's bill title fails to substantially comply with § 5-4-102, MCA.

This conclusion finds support in the Legislative Services Division's Bill Drafting Manual, as well. Specifically, the Bill Drafting Manual reminds referendum drafters that when drafting an amendment they need to "include the insertion or removal of all amended or repealed MCA section numbers,"[2] and to simultaneously "[w]atch for the 100-word limitation in the title of a referendum." *See* Montana Legislative Services Division Bill Drafting Manual § 8-2 (2012) (hereinafter "Bill Drafting Manual") (available at: http://leg.mt.gov/content/Publications/2012%20bill%20drafting%20manual.pdf). In writing a title that

[2] While this statement may be incorrect, it demonstrates that the Legislative Services believes section numbers constitute words.

complies with the 100-word limitation, the manual explains "the *title* of a bill should both indicate the general purpose of the amendment and list the *MCA sections* being amended or repealed." *See* Bill Drafting Manual at § 4-4(5) (emphasis added). It then provides an example of an appropriate title, which is less than 100 words:

> AN ACT AMENDING THE LAWS RELATING TO THE SALE OF LANDS FOR TAXES BY COUNTY TREASURERS; ELIMINATING CERTAIN REQUIREMENTS; AMENDING SECTIONS 7-1-101 AND 7-1-102, MCA; AND REPEALING SECTIONS 7-1-109 AND 7-1-110, MCA.

See Bill Drafting Manual at § 4-4(5).

The manual further explains, if the only purpose of a bill is to repeal one or more sections, "the *title* must indicate the subject matter and list the *section numbers*." *See* Bill Drafting Manual at § 4-4(5). Similarly, in Appendix I, which provides an example referendum, the example title contains section numbers and the manual notes that "[t]he title is limited to 100 words." *See* Bill Drafting Manual at pp. 133-34. In light of the fact that the manual includes section numbers as part of the title and the title is limited to 100 words, it follows that the section numbers constitute words for the purpose of the 100-word limitation found at § 5-4-102, MCA.

When election authorities address this issue, they regularly define words to include numbers. Florida election rules, for example, require that "[e]ach whole

number shall count as a word" in order to determine the word count for constitutional initaitive ballot titles and summaries. *See* Fl. Admin. Code 1S-2.009(4)(g). Likewise, in California, the Elections Code states, "Any number consisting of a digit or digits shall be considered as one word. Any number which is spelled, such as 'one,' shall be considered as a separate word or words. 'One' shall be counted as one word whereas "one hundred" shall be counted as two words. *'100' shall be counted as one word.*" *See* Cal. Elections Code § 1-20 9(a)(7) (emphasis added). Similarly, Oregon has defined "words" to be inclusive of numbers. *See* Or. Admin. R. 165-022-000(c).

Further supporting this conclusion, is M. R. App. P. 11(e), which permits the word count in Supreme Court briefs to be determined by relying "on the word count of the word processing system used to prepare the brief." The rule is instructive because both Microsoft Word and Word Perfect include numbers in their word counts, and therefore, when any appellant or appellee conducts a word count of a brief, Montana Code Annotated section numbers are included therein as words. Using this method, the Bill Title is 196 words, which is nearly double the amount permitted by § 5-4-102, MCA.

Similarly, other courts treat numbers as words. In *Northbrook Digital, LLC v. Vendio Servs.*, 625 F. Supp. 2d 728, 733-34, fn. 2 (D. Minn. 2008), the attorneys for Vendio attempted to meet a 3,500 word limitation at issue by inserting

superfluous hyphens to decrease the number of words. The court recognized this artificial deflation of the word count, and chastised the Vendio's counsel for writing "Docket-59" instead of "Docket 59" because it decreased the number of words by eliminating the "59" from being counted as a word. *See also Franklin v. Florida*, 887 So. 2d. 1063, at fn. 3 (Fla. 2004) (wherein the court implicitly accepted numerical sections of code as words); *Cook v. Baker*, 214 P.2d 787 (Colo. 1950) (accepting "section 14" as two words); *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 293 P.3d 874 (Nev. 2013) (implicitly finding "Section 501(c)" constitutes two words); *Bendl v. Kulongoski*, 902 P.2d 1189 (Or. 1995) ("March 30, 1995" is three words).

Because section numbers are considered words, LR-127 far exceeds the 100-word limitation in § 5-4-102, MCA, and is facially invalid. This Court, therefore, should remove LR-127 from the ballot because "[p]lacing a facially invalid measure on the ballot would be a waste of time and money for all involved, including State and local voting officials, the proponents and opponents of the measure, the voters, and the taxpayers who bear the expense of the election." *MEA-MFT v. McCulloch*, 2012 MT 211, ¶ 18, 366 Mont. 266, 291 P.3d 1075.

2. Counting the section numbers as words does not infringe on Montanans' constitutional rights.

It is unclear whether the Attorney General is asking this Court to find § 5-4-102, MCA, unconstitutional. However, in any case, the 100-word limitation on titles the Legislature places on referenda bills does not infringe on Montanans' constitutional rights. While Article III, § 5 of the Montana Constitution does ensure that voters have the right approve or reject any act of the Legislature by referendum, it does not permit the Legislature to place a title on a referendum bill that violates Montana statutes.

Section 5-4-102, MCA, is a restriction placed on the Legislature, not on the voters. *See e.g. Harper v. Greely*, 234 Mont. 259, 763 P.2d 650 (1988). It requires that "any *bill* referred by the legislature" must have a title of 100 words or less. Section 5-4-102, MCA (emphasis added). Thus § 5-4-102, MCA, is regulating the kind of title the Legislature may place on a referendum bill, and not the ability of voters to vote on an act of the Legislature. The Court recognized this distinction in *Harper*, when it stated, "the legislative referendum is a product of the Legislature and is passed in the form of a bill." 234 Mont. at 265, 763 P.2d at 654 (emphasis added). As a result, if the bill title of SB-408/LR-127 exceeds 100 words, which it does, then it does not satisfy the requirements of a referendum bill, is facially invalid and cannot be presented to the voters.

3. A ballot title is not required to include the section numbers of the code sections being amended or repealed.

Neither the Montana Code Annotated nor the Montana Constitution requires section numbers to be included in the title of an initiative. The Attorney General claims that "Montana law requires bill titles to fully list every amended section within the bill." *Attorney General's Response* at 8. This interpretation is incorrect.

The Montana Constitution does not require section numbers to be included in a bill title. The people of Montana "may approve or reject by referendum any act of the legislature except an appropriation of money." Mont. Const. Art. III, § 5. Each such act, "except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title." Mont. Const. Art. V, § 11(3). The purpose of this limitation "is to prevent the use of a title which may be a cover for surreptitious legislation, and to require such a title as is reasonably calculated to give notice of the contents of the bill." *State v. Duncan*, 74 Mont. 428, 436, 240 P. 978, 980 (1925). A title is thus sufficient if it "fairly indicates the general subject and does not tend to mislead the members of the legislature or the people." *Duncan*, 74 Mont. at 436, 240 P. at 980.

When applied to an amendatory act, such as the one at issue here, "these rules do not require more than that the title shall refer to the statute to be amended, with sufficient particularity to identify it." *Duncan*, 74 Mont. at 436, 240 P. at 980.

The title "need not be so comprehensive as to constitute *a complete index to or abstract of the section.* 'All that is required in such case is a reasonable degree of certainty as to the statute to be amended.'" *Duncan*, 74 Mont. at 437, 240 P. at 980 (citing *In re White*, 51 N.W. 287 (Neb. 1892)) (emphasis added). In other words, "Details need not be mentioned. The title need not contain a complete list of all matters covered by the Act." *State v. McKinney*, 29 Mont. 375, 382, 74 P. 1095, 1096 (1904). Contrary to the Attorney General's strained interpretation, the *Duncan* opinion makes clear that Montana law does not require listing each section to be amended.[3]

B. LR-127 is invalid because it is not a general revision of the law and it encompasses more than a single subject.

Section 11(3) of Article V of the Montana Constitution prohibits any bill, "except general appropriation bills and bills for the codification and general revision of the laws," from containing more than one subject. The single subject limitation applies equally to referenda and bills. *See e.g., Harper,* 234 Mont. at 266, 763 P.2d at 654*; see also Mont. Auto. Assn. v. Greely*, 193 Mont. 378, 632 P.2d 300 (1981). Thus, if a referendum contains more than one subject, it does not meet constitutional requirements and may not be placed on the ballot.

[3] However, even if Montana law did require naming every amended section and subsection in the title of the referendum, it would not alter the plain meaning of the 100-word statute or the universally accepted definition of "word." Moreover, neither the Montana Code or the Montana Constitution provide that named statutory sections should be excluded from the word count in referendum bill titles.

The Attorney General's argument that it does not need to conduct a substantive review is misplaced. It is true that the Attorney General's review does not require "consideration of the substantive legality of the issue," but the Attorney General must ensure that "the proposal complies with the applicable statutory and constitutional requirements governing submission of the proposed issue to the electors." *Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, ¶ 3, 365 Mont. 520, 285 P.3d 435. One such constitutional requirement is the single-subject rule. The single-subject rule goes to the heart of rules concerning submission of issues to the voter: It is unfair to ask the voters to decide two different policy questions with one vote. Unlike the challenge to I-166 before this Court in 2012, which alleged that a citizen-launched ballot initiative suffered several substantive constitutional infirmities, the instant suit addresses whether a referendum "complies with the statutory and constitutional requirements governing submission of the proposed issue to the electors." *Montanans Opposed to I-166*, ¶ 6. The 100-word title rule and the single-subject rule are statutory and constitutional requirements that govern *how an issue may be proposed* by legislative referendum to the electors. They are both designed not to deprive the voters of power, or even to limit the scope of laws, but to ensure that the voters are treated fairly and that the election process is fair. Placing a multi-issue referendum on the ballot would be fundamentally unfair to the voters, forcing each voter to cast an all or nothing

vote on distinct, separate policy issues. For these reasons, the 100-word title rule and the single-subject rule must be part of the Attorney General's legal sufficiency review.

Further, addressing both of these issues now serves the interest of governmental economy and integrity; permitting LR-127 to be placed on the ballot would created "a sham out of the voting process by conveying the false appearance that a vote on the measure counts for something, when in fact the measure is invalid regardless of how the electors vote." *Reichert v. State*, 2012 MT 111, ¶ 59, 365 Mont. 92, 278 P.3d 455.

1. LR-127 is not a general revision of the law and must comply with the single-subject rule.

LR-127 is not a general revision of the law. Article V, § 3 of the 1972 Montana Constitution, is rooted in the Territorial Constitution, which provided, "No bill, except appropriation bills shall be passed containing more than one subject." Mont. Const. Art. IV, § 23 (1884). This language was changed in 1889, concurrent with statehood, to incorporate a second exception to the single-subject rule, namely providing that "bills for the codification and general revision of the laws" could contain more than one subject. Mont. Const. Art. IV, § 23 (1889). Simultaneous with this change, and statehood, a commission was appointed to create the Codes of Montana. In 1892, the commission filed the Codes with the

secretary of state. The following year, the Third Legislative Assembly took no action on the codes, but enacted numerous laws on subjects covered by the codes and separate subjects; creating essentially two sets of laws that needed to be incorporated into one Montana Code. Because the Third Assembly took no action, it fell on the Fourth Legislative Assembly to undertake the "codification and general revision of the laws of the state, both those which had been carried forward from the session acts of the territory and those which had been enacted at the third session of 1893." *In re Ryan*, 20 Mont. 64, 65, 50 P. 129 (1897). *See also State ex rel. Cotter v. Dist. Ct.*, 49 Mont. 146, 140 P. 732 (1914). It is in this context that the general revision exception to the single-subject rule has its roots.

In order for a bill to fit within the general revision exception, its purpose must be to manifestly harmonize and revise generally existing statutes in order to render them consistent with each other and to eliminate conflicts existing between separate acts. Two early Montana cases discuss the exception in these terms. In *Ryan,* the Court excepted a House Bill No. 291 from the single-subject rule because its purpose was manifestly "to harmonize and revise generally the sections in the Political Code and in the Act of 1893 pertaining to municipal corporations." *Ryan*, 20 Mont. at 66, 50 P. at 130. Similarly, in *Cotter*, the Court excepted an Act because it was adopted in conjunction with the Codes. *Cotter*, 49 Mont. at 153, 140 P. at 734-35. The *Cotter* Court recognized generally that:

> The adoption of the Codes, with such amendments as were deemed necessary and advisable to render them harmonious and consistent with each other, and to eliminate conflicts which existed between many of their provisions and other Acts of the legislature which it was designed to preserve and keep in force, we think that the separate bills, the obvious purpose of which was to revise and harmonize or amend the laws on particular subjects, should be regarded as revisionary in character and be held to fall within the exception.

Cotter, 49 Mont. at 152, 140 P. at 734.

A general revision as explained in *Cotter* may be either an omnibus revision bill, or revision of the laws on a particular subject, but in either case its purpose must be to harmonize existing statutes because "a revision by its nature is not indented to change anything, but only to restate what has already been legislated." *State v. Baker*, 489 A.2d 1041, 1045 (Conn. 1985); O. Hood Phillips, *A First Book of English Law*, Fourth Edition, Sweet & Maxwell, 1960, p. 90 (defining revision as "the reprinting of statute law with the omission of obsolete matter").

Importantly, this definition of general revision is supported by the purpose for the exception. In *Cotter*, the Court explained that the exception for "bills for the codification and general revision" from the one-subject rule was that the bills are "so extraordinary in their character that both the members of the legislative body and the public are presumed to know what is being done." Amending the law to include multiple, different, new substantive policy changes does not fit within this exception. For example, in *White Sulphur Springs v. Voise*, 136 Mont. 1, 343

P.2d 855 (1959), the town adopted the all of state's misdemeanor crimes at the local crimes through an ordinance. At the time, a town could not adopt an ordinance containing more than on subject, "except ordinances for the codification and revision of ordinances." In determining the town's action did not fall within the revision exception, the Court explained that ordinance was not "intending nor attempting to either codify or revise the town's ordinances," but rather to adopt in one ordinance all the statutes of Montana relating to misdemeanor crimes. *White Sulphur Springs*, 136 Mont. at 15-16, 343 P.2d at 862. Thus, an act adopting new law does not fit within the definition of a "revision," or within the revision exception.

Wyoming, which has an identical constitutional provision, has twice considered what constitutes a "revision" for purposes of the single-subject rule. In *Billis v. Wyoming*, 800 P.2d 401, 431 (Wyo. 1990), the Wyoming Court defined revision as "an act which restates the law embodied in one or more prior acts in order to clarify and harmonize the provisions of the prior acts and which may alter, add or omit provisions. A codification is a revision and is also a systematic arrangement of all the statutes of the state or all those concerning a general field of law." *Id.*, citing 1A Sutherland Stat. Const. § 22.27 at 254 (4th ed. 1985). Using this definition, the *Billis* Court found an act "amending; amending and renumbering; revising; eliminating duplication, redundancies and archaic

provisions; moving, combining, deleting and renumbering; providing definitions; repealing provisions; modifying provisions; eliminating certain powers; providing procedures and deleting requirements" was a general revision of Title 7, criminal procedure. *Billis*, 800 P.2d at 431. Similarly, in *Uhls v. Wyoming*, 429 P.2d 74, 89 (Wyo. 1967), the Court found a bill enacting a municipal code that was a compilation of previously existing Wyoming statutes related to or concerned with cities and towns fell within the general revision statute. In both *Billis* and *Uhls*, as in Montana, the Court recognized that for an act to be a general revision it needed to harmonize pre-existing statutes.

This rule, that a general revision is meant to harmonize existing statutes, finds support across the country. *See Taylor v. Bowker*, 111 U.S. 110, 114 (1884); *Ruth v. Eagle-Pilcher Co.*, 225 F.2d 572 (10th Cir. 1955); *Ex parte Coker*, 575 So. 2d 43, 48-49 (Ala. 1991); *Lindsay v. U.S. Sav. & Loan Co.,* 28 So. 717 (Ala. 1899); *People v. Gould*, 178 N.E. 133, 144, (Ill. 1931); *Pratt Institute v. New York*, 75 N.E. 1119 (N.Y. 1905); *Commonwealth v. Solley*, 121 A.2d 169 (Pa. 1956); *Lewis v. Annie Creek Mining Co.*, 48 N.W.2d 815 (S.D. 1951); 1A Sutherland § 28.8 at 626 (7th ed. 2007).

Under each of the above definitions of "revision," it is clear that this exception from the one-subject rule is intended to apply in cases where existing law is being reorganized, or where wording is being changed to enhance the

readability of the law. It is not intended to be used to substantively change existing laws. To allow it to be used in such a way would permit the exception to swallow the rule; a result this Court seeks to avoid. *See Molnar v. Fox*, 2013 MT 132, ¶ 33, 370 Mont. 238, 301 P.3d 824.

In the present matter, LR-127 is not "a general revision" of the law. On its face the purpose of this referendum is not to "harmonize and revise generally existing statutes in order to render them consistent with each other and to eliminate conflicts existing between separate acts." Instead, the purpose—or rather purposes—are (1) to eliminate the existing primary election system in order to implement an open primary election, and (2) to institute a system in which the top two candidates in the primary advance to the general election regardless of party and without party nomination status. The referendum's obvious unstated corollary purpose is to eliminate third parties from the general election. In this regard, LR-127 is drastically different from either *Cotter* or *Ryan*, where the Legislature sought to harmonize and consolidate two different sets of laws. Because LR-127 is a not a general revision of the law, it is invalid if its content is not limited to a single subject.

2. LR-127 encompasses more than a single subject in violation of Mont. Const. Art. V, § 11(3).

LR-127 embraces more than one subject and is therefore invalid. In determining the whether a bill contains more than one subject, the Court must look to the provisions of the bill itself, and not merely the title. *See e.g., State ex rel. Normile v. Cooney*, 100 Mont. 391, 405, 47 P.2d 637, 644 (1935). "The purpose of requiring singleness of subject is to prevent the practice of embracing in the same bill incongruous matters which have no relation to each other." *State v. Morgan*, 1998 MT 268, ¶ 12, 291 Mont. 347, 968 P.2d 1120 (citing *Mont. Auto. Assn.*, 193 Mont. at 398, 632 P.2d at 311). For this reason, "the constitutional requirement that a law should contain only one subject has been strictly construed." *Mont. Auto. Assn.*, 193 Mont. at 398, 632 P.2d at 311; *State ex. rel. Replogle v. Joyland Club*, 124 Mont. 122, 143, 220 P.2d 988, 998 (1950). This language, though, contrasts with prior jurisprudence holding, "Sound policy and legislative convenience dictate a liberal construction of the title and subject-matter of statutes to maintain their validity. Infraction of this constitutional clause must be plain and obvious to be recognized as fatal." *Rosebud County v. Flinn*, 109 Mont. 537, 544, 98 P.2d 330, 334 (1940). This conflict in law can be resolved by examining the particular need to *protect voters*, as compared to legislators, from misleading referenda containing more than one subject:

> Having in mind the safeguards that are thus thrown about a measure coming before the legislature, and the purposes of those safeguards, it is instructive to note the difference in the conditions under which a measure is submitted to the electorate of this state. The members of the legislature meet for the purpose of considering legislation, and for a period of sixty days that, with a few exceptions, is their sole business. The members of that body have the advantage of conference, that is, of conferring together and each gaining from the other such information as each may possess concerning a given measure. That alone is of inestimable value; but is not practicable where a measure is submitted to the electorate. The voter to whom a measure is submitted has a business or occupation other than that of the consideration of legislation. The measure is submitted to the banker, the merchant, the farmer, the lawyer, the laborer, the housewife. In other words, the voter is of necessity devoting a very large part of his time and energy to the conduct of his business, to the performance of the divers [sic] and sundry duties which devolve upon the citizen in the management of his affairs, in the earning of a livelihood, or in caring for a home. If it be wise (and experience has proven that it is) that so many safeguards be thrown about the legislature in connection with the enactment of a measure into a law, how much more necessary is it that those safeguards surrounding the submission of a proposed measure to the vote of the electorate be observed."

Sawyer Stores, 103 Mont. at 167-68, 162 P.2d at 351-52. Because an average voter is less likely to be knowledgeable about the contents of a referendum, this Court should strictly construe the single subject requirement. Doing so would protect voters against insidious legislation seeking to circumvent the democratic process by hiding separate subjects within one generic bill title or by forcing electors to cast all or nothing votes on multiple distinct policy proposals.

With this in mind, if "after giving the benefit of all reasonable doubts, it is apparent that if two more independent and incongruous subjects are embraced in its provisions, the Act will be held to transgress the constitutional provisions, and to be void by reason thereof." *Evers v. Hudson*, 36 Mont., 135, 146, 92 P. 462, 466 (1907); *State v. Ross,* 38 Mont. 319, 323, 99 P. 1056, 1057 (1909).

In a practical sense, this means that "a submission is void where two propositions have been submitted so as to have one expression of the voter answer both propositions, and this for the reason that voters might thereby be induced to vote for both propositions who would not have done so if the question had been submitted singly." *Sawyer Stores*, 103 Mont. at 173, 162 P.2d at 354 (citing *Smith v. State*, 113 P. 932 (Okla. 1911))(emphasis supplied). Stated another way, the test of whether a referendum encompasses more than one subject under Mont. Const. Art. V, § 11(3), is by asking whether one subject could be adopted without the other, or whether one subject could be adopted without being controlled, modified or qualified by the other. *See e.g, McBee v. Brady*, 15 Idaho 761, 100 P. 97 (1909).

In the present matter, LR-127 embraces multiple subjects that are independent of each other. The primary purpose of LR-127 is to replace Montana's current primary election system with an open primary, wherein the voters can vote for any person on the ballot irrespective of party. But, LR-127

goes beyond this subject and also requires that the top two candidates will advance, deviating from the current practice by which the top vote getter for each party advances beyond the primary. Section 13-1-103, MCA; Mont. S. 408, 2013 Reg. Sess. § 20 (Mar. 28, 2013). Moreover, LR-127 eliminates the affiliation of a candidate with a political party and only permits a candidate to have a "party preference." *See generally*, Mont. S. 408, 2013 Reg. Sess. Additionally, each of these subjects could be passed as independent legislation without impacting the other subjects. Montana could adopt an open primary but allow the top candidates within each political party to square off in the general election. Montana could also retain the single party primary ballot while allowing the two top vote getters, regardless of party, to advance to the general election. Each of these proposals is independent of the other and could pass or fail regardless of the fate of the other. LR-127 does not allow Montanans to express their support or opposition to these distinct proposals separately; it forces each elector to cast an all or nothing ballot. This is unfair to the voter and also makes it impossible to discern afterwards whether the voters supported one proposal, the other, both or neither.

This analysis is consistent with *Sawyer Stores*. If LR-127 is placed on the ballot, voters will be required to vote for two or more propositions under one expression, and thereby may be induced to vote for everything when they would not have voted for each part separately. *Sawyer Stores*, 103 Mont. at 167-68, 162

P.2d at 351-52. For all these reasons, LR-127 violates Mont. Const. Art. V, § 11(3)'s prohibition on referenda containing more than one subject and it is therefore legally insufficient.

C. The statement of purpose and implication prepared by the Attorney General is misleading in violation of § 13-27-312, MCA.

The Attorney General's ballot statement does not comply with Montana law. Under §§ 13-27-315 and 312, MCA, the Attorney General must prepare "a statement of purpose and implication, not to exceed 135 words, explaining the purpose and implication of the issue." This statement "must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language and may not be arguments or written so as to create prejudice for or against the issue." Section 13-27-312(4), MCA. The reason for requiring the statement of purpose "is to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot. As a general matter, the title and summary preceding an initiative need not contain a complete catalog or index of all provisions within the initiative." *Citizens Right to Recall v. State*, 2006 MT 192, ¶ 16, 333 Mont. 153, 142 P.3d 764 (internal citations omitted). If "the statement of purpose prepared by the Attorney General meets all the requirements of § 13-27-312(4), MCA, we will defer to his decision," and uphold the statement of purpose

and implication. *Stop Over Spending Montana*, ¶ 18. This practice "reflects the rule followed in other jurisdictions that courts "do not sit as some kind of literary editorial board. Courts thus will not invalidate a summary simply because they believe a better one could be written." *Mont. Consumer Fin. Ass'n v. State,* 2010 MT 185, ¶ 10, 357 Mont. 237, 238 P.3d 765, (internal citations omitted).

Here, the statement of purpose does not provide fair notice, and is thus not truthful, of LR-127's contents to the voters. Instead, it misleads voters. The statement, as well as the referendum title, provides that "the two candidates who receive the most votes in certain primary elections for partisan offices will advance to the general election irrespective of political party affiliation ... LR-127 does not amend the primary process for party precinct elections or presidential primary elections." This language is not only misleading, but it is untruthful. LR-127 amends party precinct elections and presidential primary elections by combining the formerly separate, party-based, primary ballots into one ballot. Additionally, LR-127 requires voters in these partisan primary elections to mark a party preference, and if a voter fails to do so, their vote will not count. These changes are a substantial deviation from the past, and claiming that LR-127 "does not amend the primary process" is untruthful and misleading.

The ballot statement also tends to mislead voters because it contains contradictory information. The statement provides that the "primary process for

party precinct election or presidential primary elections" is not amended. Yet, following this sentence, the statement claims that "LR-127 amends primary election balloting by requiring all races to appear on the same ballot." These sentences contradict because LR-127 cannot amend primary election balloting in "all races," while simultaneously not changing the primary election process in political party precinct elections or presidential primary elections.

In addition, the ballot statement is not a truthful expression of the referendum because it omits substantial parts of the referendum from its explanation of the referendum. In particular, the ballot statement makes no mention that LR-127 essentially eliminates state political parties by only permitting candidates to state the party they prefer. The statement also fails to disclose the fact that in presidential elections, electors must mark a party affiliation or their vote for a candidate in a partisan primary election will not count. In addition, the statement omits the fact that the requirements to obtain a filing fee waiver are substantially changed in LR-127.

The above omissions and contradictions prevent a voter from being informed of the contents of LR-127, thereby preventing a voter from casting "an intelligent and informed ballot." They further demonstrate that the phrase "also generally amends certain related procedures regarding ..." is inadequate because

the voters are not informed of the above amendments or the other relevant amendments in LR-127. LR-127 should, therefore, be removed from the ballot.

The Attorney General contends that Petitioners' allegation that the ballot statement is untrue and misleading fails because Petitioners have not proposed alternative language as described in §13-27-316(3)(b), MCA. While it is true that Petitioners did not propose alternative ballot language, this Court has the authority, if it wishes, to order such revision *sua sponte*, even where the Petitioners do not propose alternative language. In *Montana Consumer Finance Ass'n*, ¶ 13, this Court rejected the very argument by the state that "the petition must be dismissed" because it did not contain an alternate wording. *See* Attorney General's Response Brief at 6 (available at: http://applicationengine.mt.gov/getContent?vsId={94843378-5DF2-4358-BBF2-14E4B012CA68}&impersonate=true&objectStoreName=PROD%20OBJECT%20STORE&objectTYPE=document). The Court disagreed with the Attorney General and cited to § 13-27-316(c)(ii), MCA, which provides "[i]f the court decides that the ballot statements do not meet the requirements of 13-27-312, it may order the attorney general to revise the statements within 5 days or certify to the secretary of state a statement that the court determines will meet the requirements of 13-27-312. A statement revised by the attorney general pursuant to the court's order or certified by the court must be placed on the petition for circulation and on the official ballot." *Mont. Consumer*

Fin. Ass'n, ¶ 13. Relying on this statute, the Court changed the language of the ballot statement and certified the new language to the Secretary of State. *Mont. Consumer Fin. Ass'n*, ¶ 13. For this reason, the Court here, as in *Montana Consumer Finance Ass'n,* should not dismiss Petitioners' challenge to the ballot statement.

VII. CONCLUSION

LR-127 violates Montana's statutes and Constitution. It does not comply with § 5-4-102, MCA, because its title is more than 100 words. Nor does LR-127 comply with Article V, § 11(3) of the Montana Constitution because it contains more than a single subject. These are matters of legal sufficiency that go straight to the fairness of the submission to the electorate. Yet, the Attorney General found LR-127 legally sufficient. Because the Attorney General's legal sufficiency determination was incorrect, and his statement of purpose and implication was misleading, the Petitioners respectfully request this Court to find that LR-127 is void and may not appear on the ballot.

DATED this 9th day of January, 2014.

MORRISON, SHERWOOD WILSON & DEOLA, PLLP

BY: _____

John M. Morrison
Frederick Sherwood
Robert Farris-Olsen
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2008 for Mac is 7,695, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

BY: _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of January, 2014, a true and accurate copy of the foregoing document was duly served via first-class mail to the following:

TIMOTHY C. FOX
MONTANA ATTORNEY GENERAL
JON BENNION
DEPUTY ATTORNEY GENERAL
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Attorneys for Respondent

BY: _____